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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 278

314-624

THE NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY,
Petitioner,

v.

L. P. BREWER, FORMER COLLECTOR OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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L. P. BREWER, FORMER COLLECTOR OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner, The National Life and Accident Insurance Company, a corporation, hereinafter referred to as the taxpayer, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered in the above-entitled cause on April 17, 1941, reversing the decision of the United States District Court for the Eastern District of Tennessee, which was in favor of the taxpayer.

OPINIONS BELOW.

The opinion of the District Court (R. 80-98) is not officially reported. The opinion of the Circuit Court of Appeals (R. 105-110) is reported in 119 F. (2d) 313.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on April 17, 1941. (R. 105.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Is a suit for the recovery of income taxes erroneously collected for the calendar year 1920, which was begun in the District Court on June 7, 1930, within five years of June 12, 1925, when payment was made of the entire tax as determined and assessed by the Commissioner of Internal Revenue after an audit, which was completed on April 4, 1925, timely under Section 1113 (a) of the Revenue Act of 1926, reenacting Section 3226 of the Revised Statutes, as amended, to recover the entire overpayment of tax for that year even though a portion of the overpayment was paid on account more than five years prior to the institution of the suit? The taxpayer filed a sufficient claim for refund on July 10, 1925 in due time under Section 284 of the Revenue Act of 1926 to protect the entire overpayment of tax for 1920.

In the audit, the Commissioner erroneously excluded from the taxpayer's invested capital its life insurance reserves which were maintained pursuant to State law, and asserted deficiencies in tax aggregating $72,514.73 for 1919 and 1920, which were paid on June 12, 1925. Part of such deficiency assessments was attributable to the disallowance of the life insurance reserves as invested capital. On October 14, 1931, during the pendency of the suit, the Commissioner issued certificates of overassessment, wherein the

life insurance reserves were restored to invested capital conformably with *Moncure* v. *Atlantic Life Ins. Co.*, (C. C. A. 4), 44 F. (2d) 167, decided October 21, 1930, certiorari denied, 283 U. S. 823, following *Duffy* v. *Mutual Benefit Life Ins. Co.*, 272 U. S. 613, decided November 29, 1926, which held that such life insurance reserves constituted invested capital, and such certificates showed an overpayment of tax of $22,631.31 for 1919, which was refunded with interest, and an overpayment of tax of $15,622.19 for 1920, only $249.40 of which was refunded with interest. The District Court entered judgment in favor of the taxpayer for the balance of the overpayment of tax of $15,372.69 with interest for the year 1920.

Does the phrase, "such tax," as used in Section 1113 (a) of the Revenue Act of 1926, governing the time for suit, refer to the total tax for the year in question whenever determined and assessed? Does "payment" within the meaning of Section 1113 (a) occur when the entire tax as determined and assessed is paid? If so, the taxpayer's suit here was timely, because it was brought on June 7, 1930, within five years of June 12, 1925, when payment was made of the entire tax for the year 1920 as determined by the Commissioner in his audit which was completed on April 2, 1925, and thereafter assessed. The questions as set forth above were affirmatively answered by this Court in *U. S.* v. *A. S. Kreider Co.*, 85 L. ed. 946, which was decided unanimously on May 26, 1941, after the decision of the Sixth Circuit in this case.

Part of the original tax for 1920 became refundable upon the restoration of life insurance reserves to invested capital, because in the audit, the Commissioner greatly increased the taxpayer's reported net income for 1919 and reduced it for 1920.

The sole remaining dispute in this case is whether the taxpayer is entitled to recover the balance of the overpayment of tax for 1920 in the sum of $15,372.69 with interest for 1920.

STATUTE AND OTHER AUTHORITIES INVOLVED.

The statute and other authorities involved are set forth in the Appendix.

STATEMENT.

This case was tried before the District Court on a stipulation of facts, which was adopted by the Court as its findings of fact. (R. 80-91.)

The facts may be summarized as follows:

The National Life and Accident Insurance Company, a corporation organized and existing under the laws of the State of Tennessee, hereinafter referred to as the taxpayer, filed pursuant to the Revenue Act of 1918 corporation income and profits tax returns, showing a net income of $339,485.83, invested capital of $3,154,297.57 and tax due of $47,014.04 for the calendar year 1919, and a net income of $455,228.62, invested capital of $3,758,724.49 and a tax due of $70,698.13 for the calendar year 1920. Such taxes were paid in quarterly installments during 1920 and 1921. The tax of $70,698.13 for the year 1920, which is the only year in dispute here, was paid as follows: March 11, 1921, $17,674.54; June 15, 1921, $17,674.53; September 12, 1921, $17,674.53 and December 13, 1921, $17,674.53, total $70,698.13. (Findings 1-4, R. 80-81; Finding 20, R. 90.)

The taxpayer in arriving at its invested capital as aforesaid included the life insurance reserves which it was required to maintain under the laws of the State of Tennessee. (Finding 5, R. 81.)

In an audit which was completed on April 4, 1925, the Commissioner of Internal Revenue disallowed as invested capital the life insurance reserves, and determined deficiencies in tax of $72,265.33 for 1919 and $249.40 for 1920, which were thereafter assessed, and the taxpayer paid the same to the respondent on June 12, 1925. (Findings 6-10, R. 82-83.)

On April 16, 1925, prior to the assessment and payment of the deficiencies, the taxpayer signed Form 7858, waiv-

ing its right of appeal to the United States Board of Tax Appeals as provided for by Section 274 (a) of the Revenue Act of 1924, and consenting to the immediate assessment of the additional taxes for 1919 and 1920, reserving, however, the right to question the ruling of the Department on the matter of the inclusion of its life insurance reserves as invested capital. (Finding 9, R. 82-83; Exhibit C, R. 41.)

In the audit, the Commissioner determined the taxpayer's net income for 1919 to be $485,277.20 (Exhibit A, R. 29, 31) instead of $339,485.83 as reported (Finding 3, R. 80), an increase of $145,791.37, and the net income for 1920 to be $359,579.49 (Exhibit B, R. 39, 40; Findings 6-7, R. 81-82) instead of $455,228.62 as reported (Finding 4, R. 81), a decrease of $95,649.13. The great disparity between the deficiencies in tax for 1919 and 1920 was because of this adjustment in net income.

On July 10, 1925, the taxpayer duly filed with the said Commissioner on Form 843 its claim for refund in the sum of $72,514.73 (or such greater amount as is legally refundable) for the years 1919 and 1920, based on the ground that under the Revenue Act of 1918 it was entitled to include its life insurance reserves in its invested capital for those years. The said Commissioner disallowed the claim on January 9, 1926. (Finding 11, R. 83; Exhibit D, R. 42-45.)

On February 2, 1927, the taxpayer filed with the said Commissioner a further application and claim for refund on Form 843 in the sum of $65,259.94 (or such greater amount as is legally refundable) for the years 1919 and 1920, suggesting to the Commissioner that the refund should be allowed under *Duffy* v. *Mutual Benefit Life Ins. Co.*, 272 U. S. 613, decided November 29, 1926, which recognized that such life insurance reserves constituted invested capital. (Finding 12, R. 83-84; Exhibit E, R. 46-49.) On March 10, 1927, the said Commissioner notified the taxpayer that the decision was not applicable, because it involved a mutual company having no capital stock, whereas the taxpayer had capital stock. (Finding 13, R. 84-85.)

On October 28, 1929, the taxpayer notified the said Commissioner of the decision of the District Court for the Eastern District of Virginia in *Atlantic Life Ins. Co.* v. *Moncure*, 35 F. (2d) 360, decided October 7, 1929, holding that *Duffy* v. *Mutual Benefit Life Ins. Co.*, was controlling in the case of a stock company. (Finding 15, R. 86.) On April 25, 1930, the said Commissioner advised the taxpayer that the Bureau did not acquiesce in the District Court's decision, and that an appeal was contemplated. In answer to the taxpayer's inquiry as to what steps will be necessary to avoid the statute of limitation running, the said Commissioner notified the taxpayer that since the additional tax was paid on June 12, 1925, suit may be filed prior to June 12, 1930. (Finding 16, R. 87-89.)

On June 7, 1930, the taxpayer's suit was begun in the District Court claiming $46,509.73 for 1919 and $18,750.21 for 1920 based on the includability of its life insurance reserves in invested capital. (R. 5-14, Finding 20, R. 90.)

On October 14, 1931, the said Commissioner conformably with *Moncure* v. *Atlantic Life Ins. Co.*, (C. C. A. 4), 44 F. (2d) 167, decided October 21, 1930, affirming the District Court's decision, 35 F. (2d) 360, certiorari denied, 283 U. S. 823, issued to the taxpayer certificates of overassessment based on a restoration of its life insurance reserves to invested capital, disclosing an overpayment of $22,631.31 for 1919, which was thereafter refunded with interest, and an overpayment of $15,622.19 for 1920. The said Commissioner only refunded $249.50 with interest for the year 1920, the deficiency assessment paid on June 12, 1925, and held that the balance of $15,372.69 was barred. The said $15,372.69 is a portion of the fourth quarterly installment of original tax for 1920 paid on account December 13, 1921, (Findings 17-20, R. 89-91; Exhibits I and J, R. 54-63) and the sole controversy in this case concerns the timeliness of the suit begun on June 7, 1930, to recover the entire overpayment for 1920. The District Court held that the suit was timely, following the decision of the United States Court of Claims in *Hills* v. *U. S.*, 50 F. (2d) 302, 55 F. (2d)

1001, 8 F. Supp. 849, and entered judgment on July 3, 1939 in favor of the taxpayer for $15,372.69 with interest (R. 99) but on April 17, 1941, the Sixth Circuit reversed. (R. 105.)

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the taxpayer's suit which was begun on June 7, 1930 was not timely under Section 1113(a) of the Revenue Act of 1926 to recover the balance of the overpayment of tax of $15,372.69 with interest for 1920.

2. In failing to hold that the taxpayer's suit which was begun on June 7, 1930 was timely under Section 1113(a) of the Revenue Act of 1926 to recover the balance of the overpayment of tax of $15,372.69 with interest for 1920.

3. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Circuit Court is in direct conflict with U. S. v. A. S. Kreider Co., 85 L. ed. 946, decided by this Court on May 26, 1941, after the decision below was rendered.

1. The decision of the Circuit Court is in direct conflict with *U. S.* v. *A. S. Kreider Co.*, 85 L. ed. 946, decided by this Court on May 26, 1941, after the decision below was rendered. In that case, it was held that in an action to recover income taxes for 1920, Section 1113(a) of the Revenue Act of 1926, prescribing five years for suit, controlled over the general six-year limitation under the Tucker Act, Section 24(20) of the Judicial Code. (28 U. S. C. A. sec. 41(20).) Section 1113(a) of the 1926 Act, which reenacted Section 3226 of the Revised Statutes, also governs the timeliness of the suit in the instant case, and is set forth in the Appendix.

This Court, speaking through Mr. Justice Murphy, said in part as follows:

"Undoubtedly, respondent has failed to begin its action within either of the periods specified in Section 1113(a). See A. S. Kreider Co. v. United States (C. C. A. 3d) 97 F. (2d) 387, 388. The suit was not instituted until March 7, 1932, although the last tax payment was made on July 26, 1926, and the claim for refund was disallowed in October, 1929.[2] * * * "

[2] "It should be noted that this action seeks recovery of money which was paid in 1921. We assume, so far as this decision is concerned, that the phrase 'such tax' in the quoted language refers to the total tax for the year in question whenever determined and assessed; or stated differently, that 'payment' within the meaning of this statute does not occur until the entire tax for 1920 is paid, including deficiency assessments made several years later. Compare Union Trust Co. v. United States (CCA 2d) 70 F. (2d) 629."

The decision of this Court in that case was unanimous. In the briefs in that case, *Hills* v. *U. S.*, 50 F. (2d) 302 was cited, and in the Government's brief, the decision of the Sixth Circuit in the instant case, *The National Life and Accident Insurance Co.* v. *L. P. Brewer, Former Collector of Internal Revenue*, was also cited.

The meaning of the quoted language from *U. S.* v. *A. S. Kreider Co., supra*, is clear. The action was there brought on March 7, 1932, more than five years after the last payment, which was made on July 26, 1926. In the instant case, the suit was begun on June 7, 1930, within five years after the last payment, which was made on June 12, 1925. In *U. S.* v. *A. S. Kreider Co., supra*, the action was brought after the Commissioner issued his certificate of overassessment. In the instant case, the action was brought prior to the issuance of the certificate of overassessment.

This Court held that the phrase, "such tax," as used in Section 1113(a) of the Revenue Act of 1926 refers to the total tax for the year in question whenever determined and assessed. In the instant case, the Commissioner in his audit of April 4, 1925, determined the total tax assessable against the taxpayer for the year 1920 to be $70,947.53, or

$249.40 more than the original tax for that year. (Exhibit B, R. 37-38; Finding 7, R. 82.) The additional tax was thereafter assessed, and the taxpayer paid the same to the respondent on June 12, 1925. (Finding 10, R. 83.)

This Court also held that "payment," within the meaning of this statute does not occur until the entire tax for 1920 is paid, including deficiency assessments made several years later. The entire tax for 1920, including the deficiency assessment in the instant case, was not paid until June 12, 1925, and therefore the taxpayer's suit which was begun on June 7, 1930 was timely, because it was instituted prior to the expiration of five years from the date of the payment of such tax.

The quoted language from *U. S.* v. *A. S. Kreider Co.*, *supra*, is strictly in point, and decisive of the instant case.

If the rule were otherwise, the result in this case would be harsh. The taxpayer here had no cause of action until after the payment of the tax following the audit of April 2, 1925, wherein the Commissioner erroneously excluded its life insurance reserves from invested capital. The Commissioner's erroneous action in 1925 created the controversy. The taxpayer here had no cause of action upon the payment of the original tax for 1920. The filing of a timely claim asserting a ground for refund is a prerequisite to suit. (Cf. *Tucker* v. *Alexander*, 275 U. S. 228; *U. S.* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269; *U. S.* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *U. S.* v. *Prentiss & Co.*, 288 U. S. 73; *U. S.* v. *Factors & Finance Co.*, 288 U. S. 89; *U. S.* v. *Andrews*, 302 U. S. 517; *U. S.* v. *Garbutt Oil Co.*, 302 U. S. 528.) The taxpayer here was not in a position to assert the ground for recovery until 1925. As applied to the peculiar facts of this case, the decision of the Sixth Circuit holding that the five year statute was set in motion upon the payment of the original taxes defeats the purpose of Section 1113(a) to afford taxpayers five years after the taxes are paid within which to institute suit. Such an unreasonable result should be avoided, and the language of the statute under consideration here does not compel it.

In *Ozawa* v. *U. S.*, 260 U. S. 178, 194, this Court, speaking through Mr. Justice Sutherland, said:

> "It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Heydenfeldt v. Daney Gold & S. Min. Co., 93 U. S. 634, 638, 23 L. ed. 995, 996, 13 Mor. Min. Rep. 204. * * * ."

In *U. S.* v. *Katz*, 271 U. S. 354, 357, Mr. Justice Stone, who delivered the opinion of the Court, made the following pertinent observations:

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose. See Hawaii v. Mankichi, 190 U. S. 197, 212, 47 L. ed. 1016, 1020, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465, and cases there cited. In ascertaining that purpose, we may examine the title of the act (United States v. Fisher, 2 Cranch. 358, 386, 2 L. ed. 304, 313; United States v. Palmer, 3 Wheat 610, 631, 4 L. ed. 471, 477; Church of the Holy Trinity v. United States, 143 U. S. 457, 462, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 516), the source in previous legislation of the particular provision in question (United States v. Saunders, 22 Wall. 492, 22 L. ed. 736; Viterbo v. Friedlander, 120 U. S. 707, 30 L. ed. 776, 7 Sup. Ct. Rep. 962; United States v. Morrow, 266 U. S. 535, 69 L. ed. 425, 427, 45 Sup. Ct. Rep. 173), and the legislative scheme or plan by which the general purpose of the act is to be carried out. See Platt v. Union P. R. Co., 99 U. S. 48, 63, 64, 25 L. ed. 424, 429; Bernier v. Bernier, 147 U. S. 242, 246, 37 L. ed. 152, 154, 13 Sup. Ct. Rep. 244."

A statute of limitations as a rule does not run until the cause of action accrues and is enforcible. Congress originally incorporated the five year period for suit after payment in Section 1318 of the Revenue Act of 1921 (42 Stat. at L. 316), changing the then existing law authorizing suit within two years after the cause of action accrued. This enactment and its legislative history are set forth in the Appendix. Section 250 (d) of the Revenue Act of 1921 gave the Commissioner of Internal Revenue five years after the return was filed for the determination and assessment of income taxes due under prior revenue acts. Thus, the Commissioner was given five years for making additional assessments, under the Revenue Act of 1918, the imposing Act in this case, and the taxpayer was given five years after he paid his taxes within which to institute suit. Congress did not evince any intent that the five year statute should be availed of in a piece-meal fashion with each payment on account for a particular taxable year.

2. The decision of the Circuit Court is in direct conflict with Hills v. U. S., 50 F. (2d) 302, 55 F. (2d) 1001, 8 F. Supp. 849.

The District Court was of the view that the instant case involving the timeliness of suit under Section 1113(a) of the Revenue Act of 1926 was not distinguishable from *Hills* v. *U. S.*, 50 F. (2d) 302. Judge Taylor, who rendered the opinion, stated in part as follows (R. 98):

> "The suit was instituted within five years after the payment of the last installment of the 1920 income tax, which, in my opinion, marked the beginning of the running of the statute, and my conclusion of law is that the plaintiff is entitled to recover the amount sued for, together with interest."

This is in entire harmony with the later expressions of this Court in *U. S.* v. *A. S. Kreider Co., supra.* The Sixth Circuit, speaking through Judge Allen, was of the view

that the five year statute started to run in 1921, notwithstanding the fact that the taxpayer had no cause of action and was not in a position to assert the ground for refund until 1925. The Sixth Circuit also expressed the view that *Hills* v. *U. S. supra,* which involved estate taxes, was inapplicable to an income tax case, but an analysis of that case will show that two issues existed there: (1) the timeliness of the claim for refund under Section 1112 of the Revenue Act of 1926, and (2) the timeliness of the suit under Section 1113 (a) of the Revenue Act of 1926. We concede that *Hills* v. *U. S., supra,* is inapplicable to an income tax case in respect of the first issue involving the timeliness of the claim for refund of estate taxes, because that subject is governed by Section 1112 of the Revenue Act of 1926, amending Section 3228 of the Revised Statutes, and Section 1112 does not apply to income taxes. Section 284 of the Revenue Act of 1926, containing special provisions, governs the timeliness of a claim for refund of income taxes. Section 1112 expressly excepted claims within the purview of Section 284. Special provisions in a statute always control over general provisions. We respectfully maintain, however, that there is no difference between *Hills* v. *U. S., supra,* and the instant case in respect of the second issue involving the timeliness of the suit, because Section 1113 (a) of the Revenue Act of 1926 governed the timeliness of the suit in *Hills* v. *U. S., supra,* and the same provision governs the timeliness of the suit in the instant case. The statute is the same, and its meaning is the same. The correct construction of Section 1113 (a) is set forth in *U. S.* v. *A. S. Kreider Co., supra,* which involved a suit for the recovery of income taxes, holding that "payment," within the meaning of Section 1113 (a) does not occur until the entire tax for 1920 is paid, including deficiency assessments made several years later.

An analysis of *Hills* v. *U. S., supra,* shows that the estate tax return in that case was filed on June 6, 1921, and a tax of $17,748.42 was paid on July 26, 1921. On April 24, 1925,

the Commissioner determined a deficiency in tax of $1,727.60, which was paid by the estate on May 16, 1925. On October 2, 1926, the estate filed a claim for refund of $4,371.33 based upon the deductibility of administration expenses paid and incurred after the filing of the estate tax return. Additional claims for refund were filed on March 1, 1928 and April 30, 1929. On June 28, 1928, the estate received a certificate of overassessment of $4,080.81 dated May 25, 1928, but the Commissioner advised the estate that "since the claim for refund was not filed within four years next succeeding the date the sum of $17,748.42 was paid, only the amount shown to have been paid on May 16, 1925, or $1,727.60 is subject to refund." (50 F. (2d) 302, 303.) The suit was begun on April 29, 1930, within five years of the payment of the whole of the tax found due and assessed by the Commissioner. The original tax of $17,748.42 was paid on July 26, 1921, beyond the five year period. (50 F. (2d) 302, 304.) The estate by the suit sought to recover $2,353.21, being the portion of the overassessment of $4,080.81, which was not refunded, and the Government filed a demurrer to the petition. (50 F. (2d) 302, 303.)

In that case, the Government contended that only such portion of the tax as was paid within four years of the filing of the claim, and only such portion as was paid within five years of the filing of the suit, was recoverable. The additional estate tax of $1,727.60 paid on May 16, 1925 (50 F. (2d) 302, 304) met these requirements, and the Commissioner refunded the same, but the balance of the overassessment of tax paid on July 26, 1921 was beyond the periods mentioned. Thus, two issues were presented: (1) the timeliness of the claim, and (2) the timeliness of the suit. In the instant case, only one issue is presented: the timeliness of the suit.

The timeliness of the claims for refund in *Hills* v. *U. S.*, *supra*, was governed by Section 1112 of the Revenue Act of 1926, amending Section 3228 of the Revised Statutes, reading as follows:

"Sec. 1112. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in sections 284 and 319 of the Revenue Act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum."

This was a general statute of limitations for filing claims for refund of any internal revenue tax, including estate taxes, but was inapplicable to income and profits taxes, because that subject was specially covered by Section 284, and Section 1112 expressly excepted claims for refund within the purview of Section 284.

The decision of the Court of Claims in *Hills* v. *U. S.*, *supra,* in respect of the timeliness of the claim for refund of estate taxes is inapplicable to such an issue respecting a claim for refund of income taxes, because of the difference in the language between Section 1112 and Section 284.

The timeliness of the suit in *Hills* v. *U. S.*, was governed by Section 1113 (a) of the Revenue Act of 1926, amending Section 3226 of the Revised Statutes, the same section which determines the timeliness of the suit in the instant case. On that particular issue, there is no difference between this case and *Hills* v. *U. S.*

In that case, the opposing contentions of the parties respecting the timeliness of the claims and the timeliness of the suit were set forth by Judge Green, who delivered the opinion of the Court (50 F. (2d) 302, 304), as follows:

"* * * The plaintiff contends that the words 'payment of such tax, * * * or sum' refer to the payment of the whole tax, and that as the deficiency assessed was not paid until May 16, 1925, the whole of the tax was not paid until that date. The suit, having been begun April 29, 1930, under this construction was with-

in the five-year limitation. The contention of the defendant is, in substance, that only that 'sum' or portion of the tax which was paid within five years from the time suit was begun can be recovered under a proper construction of the statute, and that as the amount which the commissioner refused to pay is part of the $17,748.42 paid on July 26, 1921, it is therefore barred. This question can properly be discussed in connection with defendant's contention that none of the claims were filed in time, for, although this depends on section 3228, the language used with reference to the date of payment is practically the same and, we think, susceptible of the same construction.

"It will be observed that in both sections 3226 and 3228 it is the date of the 'payment of such tax, penalty, or sum' which fixed the time from which the limitation must run. If these words refer only to the time when all of the tax which has been found to be due is paid, then all of plaintiff's claims were filed within the period fixed by law, and the suit is not barred by the statute of limitations. On the other hand, if the words 'payment of such tax, penalty, or sum' refer to a payment of a part or portion of the tax, then the period of limitation dates from the time of the actual payment of the particular sum sought to be recovered, and plaintiff's claims were not filed in time to enable her to recover any portion of the tax not paid within the period of limitations.

"Each of the sections of the statute refers to the 'payment of such tax, penalty, or sum.' * * *."

The Court of Claims overruled the demurrer in *Hills* v. *U. S.*, and recognized that since Sections 3228 and 3226 contained no provision limiting the recoverable amount to a portion of the tax paid within a certain period preceding the filing of the claims or suit, a claim for refund of estate taxes filed within four years and a suit filed within five years of the payment of the whole of the tax found due and assessed by the Commissioner were timely. These requirements were met in that case. The Court's reasons are set forth at length in the opinion.

On reconsideration of the demurrer to the petition and ruling on demurrer in *Hills* v. *U. S.*, Judge Green, speak-

ing for the Court, said (55 F. (2d) 1001, 1003-1004) in part as follows:

> "Section 3228 (26 U. S. C. A. sec. 157), which is set out in the original opinion, prescribes the time within which claims for refund must be presented to the Commissioner of Internal Revenue. Section 3226, also set out in the original opinion, fixes the time within which suit may be begun on a claim for refund. In both of these sections, the word 'tax' is preceded by the word 'such'. What we have said in the original opinion, we think, shows that the use of the word 'such' in no way limits the word 'tax' to a portion of the tax, but it may be noted in addition that, although Congress in the 1924 and 1926 acts re-enacted sections 3226 and 3228 as a part of these revenue acts, it evidently considered that these sections did not refer to a portion of the tax, and therefore inserted a special provision limiting the recovery on refunds on income and profits taxes accordingly.
>
> "When section 3226 and section 3228 are construed in accordance with the views above expressed, it will be seen that the action is not barred by the provisions of either section. The suit would be in time under section 3226, for the reason that it was begun within five years from the time the last payment was made and the whole of the tax paid, which was May 16, 1925. It would not be barred by section 3228, because the claim was presented to the Commissioner within four years after this payment was made. This will clearly appear upon further consideration of the law and the facts in the case as we must assume them to be in ruling on the demurrer.
>
> "Section 3226 (USCA sec. 156) provided that suit should not be begun upon a claim for refund or credit 'after the expiration of five years from the date of the payment of such tax, * * * unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates.'
>
> "We think it clear that the last clause of the provision is not a limitation upon the one that precedes it, although it may operate to extend the period stated therein, and that this section gives the taxpayer the right in any event to bring his suit within the five-year

> period, but he may not bring it thereafter unless the provisions of the second clause are complied with. The petition was filed April 29, 1930, which was within five years of the time when the whole of the tax was paid. Under our construction of the law, section 3226 does not bar the action."

In considering that case on the merits, the Court of Claims adhered to its former conclusions. Judge Littleton, who delivered the opinion of the Court, made the following pertinent observation: (8 F. Supp. 849, 853.)

> "* * * In any event the suit was instituted within five years after final payment of the tax, and was therefore timely under section 3226, R. S. as amended (26 USCA sec. 156)."

The construction placed upon the language "such tax," and "payment," as used in Section 1113 (a) of the Revenue Act of 1926, amending Section 3226 of the Revised Statutes by the Court of Claims coincides with the construction placed on that language by this Court in *U. S.* v. *A. S. Kreider Co., supra,* decided May 26, 1941.

The Government did not petition this Court for a writ of certiorari in *Hills* v. *U. S., supra.*

The view expressed by the Court of Claims that a refund of estate taxes was not limited by Section 3228 to the portion of the tax paid during the four year period preceding the filing of the claim provided it was filed within four years of the time when the whole of the tax found due was paid, was subsequently adopted in an unbroken line of decisions:

U. S. v. *Clarke,* (C. C. A. 3) 69 F. (2d) 748, certiorari denied October 8, 1934, 293 U. S. 564,
Union Trust Co. of Rochester v. *U. S.,* (C. C. A. 2) 70 F. (2d) 629, certiorari denied October 8, 1934, 293 U. S. 564,
U. S. v. *Magoon et al.,* (C. C. A. 9) 77 F. (2d) 804,
Safe Deposit & Trust Co of Baltimore v. *Tait,* 8 F. Supp. 634, affirmed (C. C. A. 4), 78 F. (2d), 534,
Haebler v. *U. S.,* 8 F. Supp. 855.

These cases are important in the consideration of the timeliness of suit, because as Judge Green pointed out in *Hills* v. *U. S.*, *supra*, the language used in Section 3228 with reference to the date of payment is practically the same as that used in Section 3226, and was susceptible of the same construction. Section 3228 used the language, "* * * within four years next after the payment of such tax, penalty, or sum." while Section 3226 used the language, "* * * nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, * * *."

The view that Section 1113 (a) of the Revenue Act of 1926, amending Section 3226 of the Revised Statutes, does not restrict the recoverable amount to the portion of the tax paid within five years of the institution of suit is supported by the legislative history which is set forth in *Hills* v. *U. S.* Congress by express language contained in Section 281 (b) of the Revenue Act of 1924, Section 284 (b) (2) of the Revenue Act of 1926, and Section 322 (b) (2) of the Revenue Act of 1928, limited the amount of refund of income and profits taxes for certain years to the portion of the tax paid during a certain period preceding the filing of the claim, yet in the amendment of Section 3226 of the Revised Statutes, governing the time limitation on suit, by Section 1014 of the Revenue Act of 1924 (43 Stat. at L. 253) and by Section 1113 of the Revenue Act of 1926 (44 Stat. at L. 66), Congress did not insert any such limiting clause. If Congress had intended to restrict the recoverable amount to the portion of the tax paid within five years of the institution of suit, it would have used apt language in Section 1014 of the Revenue Act of 1924 and Section 1113 of the Revenue Act of 1926, governing the time for suit by taxpayers, to effectuate that purpose. The fact that Congress placed such a restriction in the sections of the Act in respect of claims for refund cannot serve to incorporate the same idea in the section of the Act governing the period for suit.

Section 322 of the Revenue Act of 1932 approved June 6, 1932, also limited the recovery of income taxes imposed

by that Act to the portion of the tax paid during the two years immediately preceding the filing of the claim.

Section 1110 of the Revenue Act of 1932 provided as follows:

> Section 284 (h) of the Revenue Act of 1926 is amended to read as follows:
>
> "(h) Except as provided in subdivision (d) this section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1918, 1919, or 1920, if such claim is filed before the expiration of five years after the date the return was due."

The purpose of this amendment was to add the year 1918 to the exception previously made of the years 1919 and 1920 by Section 281 (f) of the Revenue Act of 1924 and Section 284 (h) of the Revenue Act of 1926.

Section 3226 of the Revised Statutes governing the time for suit, was amended by Section 1103 of the Revenue Act of 1932, which eliminated from the statute the five year period for suit, and prescribed a time limitation of two years after the disallowance of the claim for refund by the Commissioner, but expressly provided therein that a suit instituted before the enactment of that Act, or a claim which was disallowed before the enactment of that Act, was not affected by the amendment. A claim for refund, therefore, which was rejected by the Commissioner after June 2, 1932, is not affected by the issue in controversy here.

There was no provision limiting the recovery of estate taxes to the portion of the tax paid during a certain period preceding the filing of a claim until the Revenue Act of 1932. Section 810 of the 1932 Act imposed such restrictions. This amendment was obviously adopted to avoid the effect of the decision of the Court of Claims in *Hills* v. *U. S.*, *supra*. Provisions limiting recovery of income taxes

to the portion of the tax paid during a certain number of years preceding the filing of the claim for refund have been incorporated in all of the revenue acts commencing with the Revenue Act of 1924. No such limiting clause, however, was inserted at any time in Section 3226 of the Revised Statutes, governing the time limit for suit. If Congress had intended to restrict the recoverable amount to the portion of the tax paid within five years of the institution of suit, it could have inserted such a clause when the Revenue Bills of 1924, 1926, 1928 or 1932 were under consideration, all of which Acts placed a restriction on the recoverable amount to the portion of the tax paid during a certain period preceding the filing of the claim for refund of income taxes. The fact that Congress did not see fit to insert such a limiting clause in Section 3226 of the Revised Statutes, governing the time limit for suit, is very persuasive evidence of the fact that Congress had no such purpose in mind, and that the views expressed by this Court in *U. S.* v. *A. S. Kreider Co., supra,* are sound.

The position of the taxpayer in this case, that the clause in Section 284 (b) (2) limiting the recoverable amount to the portion of the tax paid during the four years immediately preceding the filing of the claim is inapplicable to Section 1113 (a) prescribing five years for suit, is strengthened by the fact that the taxpayer's claim for refund for the years 1919 and 1920, which was filed on July 10, 1925, is also timely under Section 284 (h) of the Revenue Act of 1926 to recover the entire overpayment of tax for the year 1920, without reference to the portion of the tax paid within four years of July 10, 1925.

The taxpayer's claim for refund of July 10, 1925, was timely not only under Section 284 (b) (2) of the 1926 Act to protect the entire overpayment of tax for 1920, but it was also timely under Section 284 (h) of the 1926 Act to protect the entire overpayment of tax for 1920. Section 284 is set forth in the Appendix.

The entire overpayment for 1920 amounted to $15,622.19. (Finding 19, R. 90; Exhibit J, R. 59.) The portion of the

tax paid by the taxpayer for 1920 during the four year period preceding July 10, 1925, when the claim for refund was filed, was $35,378.46, consisting of the third installment of $17,674.53 paid on September 12, 1921, the fourth installment of $17,674.53 paid on December 13, 1921, and the deficiency assessment of $249.40 paid on June 12, 1925. (Finding 4, R. 81, Finding 10, R. 83.) As the claimed overpayment for 1920 is less than the portion of the tax paid during the four years preceding the filing of the claim, the recovery of the entire overpayment is permissible under Section 284 (b) (2).

Under Section 281 (f) of the Revenue Act of 1924, Section 284 (h) of the Revenue Act of 1926 and Section 1110 of the Revenue Act of 1932 a claim for refund of income tax for the year 1920 was not barred from allowance if the claim was filed before the expiration of five years after the date the return was due. By this legislation, Congress has very clearly indicated that the restrictive clause limiting recovery to the portion of the tax paid within a certain period preceding the filing of the claim for refund was not to defeat recovery of the overpayment, if the claim was filed before the expiration of five years after the date the return was due.

Section 227(a) of the Revenue Act of 1918 governing the time for filing returns for 1920 provided in part as follows:

> "Sec. 227. (a) That returns shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the fifteenth day of March. * * *."

The taxpayer's return for the calendar year 1920 was due on March 15, 1921. It was actually filed on March 11, 1921. (Finding 4, R. 81.) The entire overpayment of tax for 1920 was allowable regardless of the limiting clause of Section 284(b)(2) because the claim for refund of July 10, 1925 was filed before the expiration of five years after March 15, 1921. The taxpayer had until March 15, 1926 within

which to file a timely claim to recover the entire overpayment of tax for 1920, including that part of the original tax, which is in dispute in this case. (Cf. *American Hide & Leather Co.* v. *U. S.*, 284 U. S. 343, 348-350; *Lucker* v. *U. S.*, 53 F. (2d) 418, 420-423; *San Joaquin Light & Power Corporation* v. *McLaughlin*, 65 F. (2d) 677, 681.)

As Congress has by Section 281(f) of the 1924 Act, Section 284(h) of the 1926 Act and Section 1110 of the 1932 Act clearly indicated an intent not to bar a claim for refund as to the year 1920 by the restrictive clause pertaining to the portion of the tax paid within a certain period preceding the claim for refund, provided the claim was filed within five years after the return was due, it is not logical to assume that Congress nevertheless intended the restrictive clause to operate as to the five year provision contained in Section 1113(a) of the 1926 Act, when no such clause appears in Section 1113(a). As applied to the facts of this case, the Congressional will was to pave the way for allowance of the claim irrespective of the portion of the tax paid, since it was filed before the expiration of five years after the date the return was due. It is not fair to assume that Congress intended under Section 1113(a) to restrict the recoverable amount for 1920 to the portion of the tax paid during the five years immediately preceding the institution of suit. The entire course of the legislation supports this Court's view of Section 1113(a) as expressed in *U. S.* v. *A. S. Kreider Co., supra.*

The petitioner concedes that its claim for refund as to the years 1919 and 1920 filed on February 2, 1927 (Finding 12, R. 83-84) was not timely under Section 284 of the Revenue Act of 1926. This claim was filed as an application to reopen and allow the refund under the decision of this Court in *Duffy* v. *Mutual Benefit Life Insurance Co.*, 272 U. S. 613, which held that life insurance reserves maintained pursuant to State law constituted invested capital. The Commissioner refused to apply that decision to the taxpayer's case under the theory that it was inapplicable to a stock company. The Fourth Circuit in *Moncure* v. *At-*

lantic Life Ins. Co., 44 F. (2d) 167, by a per curiam decision, however, said in part as follows:

> " * * * We agree with the learned judge below that the case is controlled by the decision of the Supreme Court in Duffy v. Mutual Benefit Life Insurance Co., 272 U. S. 613, 47 S. Ct. 205, 71 L. Ed. 439, and cannot be distinguished on the ground that the company there was a purely mutual company, whereas the company here is a stock company."

This Court denied certiorari on March 2, 1931, 283 U. S. 823. It is well settled that if a taxpayer files a timely claim for refund which is rejected, and subsequently files another claim repeating the same ground for refund, the second claim is ineffective under the statute. (*B. Altman & Co.* v. *U. S.*, 40 F. (2d) 781, certiorari denied, 282 U. S. 863.) The taxpayer here pursued its claim for refund and suit diligently. The Commissioner had ample authority to reopen and allow the claim. (T. D. 4235, approved October 23, 1928, Cumulative Bulletin VII-2, page 76, revoking T. D. 3240, approved October 31, 1921, Cumulative Bulletin No. 5, page 313.)

The Sixth Circuit in support of its conclusion in this case relies on *Maryland Casualty Co.* v. *U. S.*, 251 U. S. 342, modifying in part the judgment of the Court of Claims in 52 C. Cls. 201, 288, 53 C. Cls. 81, but a study of that case will show that it has no application to the controversy here. In that case, the taxpayer there failed to make an appeal to the Commissioner of Internal Revenue as required by Section 3226 of the Revised Statutes (Acts July 13, 1866, c. 184, sec. 19, 14 Stat. 152; June 6, 1872, c. 315, sec. 44, 17 Stat. 257; February 27, 1877, c. 69, sec. 1, 19 Stat. 248) and also failed to institute suit within two years after the cause of action accrued as required by Section 3227 of the Revised Statutes. (Act June 6, 1872, c. 315, sec. 44, 17 Stat. 257.) The problem in that case was wholly unlike the issue here, and furthermore was governed by the law as it existed prior to Section 1318 of the Revenue Act of 1921,

which amended Section 3226 of the Revised Statutes, and introduced the five year period for suit.

Blair v. *Birkenstock*, 271 U. S. 348, which is also referred to by the Sixth Circuit, does not militate against the correctness of *U. S.* v. *A. S. Kreider Co., supra.* It was there held that upon a refund of income tax for 1919, which was paid in installments during 1920, interest under Section 1019 of the Revenue Act of 1924 is not to be computed on the excess of each installment over what the correct installment would have been, from the date each installment was paid, but is to be computed from the date when the total amount of installments paid, first exceeded the total amount of tax due.

The Sixth Circuit also relied on *U. S.* v. *Garbutt Oil Co.*, 302 U. S. 528, but that case obviously has no application to the question at issue here. In that case a claim for refund for 1919 was filed in time to protect an additional tax paid on April 3, 1925. The claim was based on two specific grounds, which were later abandoned. Subsequent to the expiration of the period of limitation, the taxpayer filed a statement claiming refund of the entire tax paid for 1919 based on a totally different ground. This Court held that the statement filed after the period for filing claims had expired was not a permissible amendment of the original claim presented, and that it was a new claim untimely filed. There is no such dispute in the instant case.

The Sixth Circuit referred to the amended petition which was filed in this case. The suit in this case was begun on June 7, 1930 before the Commissioner issued the certificates of overassessment for the years 1919 and 1920. Suit was brought for $46,509.73 for 1919 (par. 7, R. 10) and $18,750.21 for 1920. (par. 8, R. 10.) This suit was based on the erroneous exclusion of life insurance reserves from invested capital, the same ground as stated in the claim for refund. After the Commissioner made appropriate refund for 1919, and a partial refund for 1920, the taxpayer with leave of the District Court filed an amended petition to confine the action to the amount of $15,372.69 with interest for

1920, which was the only amount which remained in dispute. The amended petition was based on the same ground as stated in the original petition, and therefore related back to it. The suit in this case was begun by the original petition, which claimed the entire overpayment of tax for 1920 based on the includability of life insurance reserves in invested capital. The suit was not begun merely to recover $15,372.69, a portion of the fourth quarterly installment of original tax for 1920. The correct amount of the overpayment for 1920 was $15,622.19 as determined by the Commissioner. (Finding 19, R. 90.) The amount which the taxpayer sought to recover by the suit begun June 7, 1930 was the entire overpayment for 1920, and this was not wholly paid until June 12, 1925, when the deficiency assessment for 1920 was paid.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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